IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 1872 OF 2003

Sudhakar Pandurang Tandel ...Petitioner
(Orig.Complainant)

Vs.

Shri Mrutunjaya Mohan Pandey & Ors. ...Respondents
(Respondent Nos.1
2 - Orig.Opponents)

Ms.Gauri Godse for the Petitioner.
Ms.Prabha Bhadade i/b. Mr.P.R. Arjunwadkar for
Respondent No.1.
Mr.P.J. Pawar for Respondent No.2.
Mr.R.S. Apte for Respondent No.3.
Mr.Y.M. Nakhawa, APP for State.

ALONGWITH

WRIT PETITION NO. 1873 OF 2003

Sudhakar Pandurang Tandel ...Petitioner
(Orig.Complainant)

Vs.

Shri Vinodkumar Kamlakant Pandey & Ors. ...Respondents
(Respondent Nos.1 to
3 - Orig.Opponents)

Ms.Gauri Godse for the Petitioner.
Ms.Prabha Bhadade i/b. Mr.P.R. Arjunwadkar for
Respondent No.1.
Mr.P.J. Pawar for Respondent No.3.
Mr.R.S. Apte for Respondent No.4.
Mr.P.S. Hingorani, APP for State.

CORAM : V.M. KANADE, J.

DATED : AUGUST 14, 2007

P.C. :-

. The petitioner by these two petitions takes exception to the order passed by the Ad-hoc Additional Sessions Judge, Thane, in Criminal Revision Application No.81/98 and Criminal Revision Application No.72/97. Since the facts and the issue involved in both these petitions are identical and since the petitioner in both these writ petitions is the same, both these petitions are being disposed of by a common order.

2. Rule by consent. Respondents waive service. Rule is made forthwith by consent of parties.

3. It is the case of the petitioner that respondent nos.1 and 2 are having their cattle shed and doing the business of dairy and cattle firming. It is the case of the petitioner that this cattle shed is situated in the middle of the city and is surrounded by residential house and that the said activity is causing nuisance to the public. It is the case of the petitioner that as a result of this activity, there is a pollution in the air

and water and area, in question, becomes the breeding ground for mosquitos as a result of which the said area is prone to malaria, cholera and other dangerous diseases. It is his case that with a view to stop this nuisance, a complaint was filed before the Sub-Divisional Officer under Section 133 of the Cr.P.C. against the respondents. By order dated 28th October, 1996, the Collector, Thane, gave direction to the said Divisional Officer to submit his report who in turn directed the Executive Magistrate to hold an inquiry. Accordingly, notices were issued to the petitioner and the respondents herein and the matter was fixed for hearing on 5th March, 1997. The Tahsildar submitted his report stating therein that the cattle shed was creating nuisance and as a result of the said activity, air and water pollution was being caused. Thereafter, the complaint was transferred to the Deputy Collector and finally, by order dated 30th July, 1997, the Special Executive Magistrate was pleased to allow the complaint of the petitioner and direction was given to remove the cattle shed within four days from the date of the order.

4. Being aggrieved by the said order, the respondents herein preferred a criminal revision application initially in the High Court and later on in the Sessions Court as they were directed to file an application in the Sessions Court. The Sessions Court was pleased to modify the said order which was passed by the Magistrate and this order of removal of cattle shed was set aside and a direction was given to the respondents to take steps for the removal of the nuisance.

5. Being aggrieved by the aforesaid orders passed in the revision application, the petitioner filed this petitioner under Article 227 of the Constitution of India.

6. The learned Counsel for the petitioner submitted that before the Executive Magistrate, the respondents had admitted that the nuisance was caused as a result of the said activity. It was submitted that therefore, in view of the admission which was given by the respondents, the Executive Magistrate was pleased to

direct the respondents to remove the cattle shed within four days. She submitted that the Executive Magistrate had a jurisdiction and authority to pass the aforesaid order while exercising his power under Section 133 of the Cr.P.C. She submitted that there was no occasion for the Sessions Court to modify the said order particularly in view of the fact that the respondents had admitted that nuisance was being caused as a result of the said activity. She invited my attention to the report which was filed by the Corporation pursuant to the directions given by this Court wherein the Corporation had admitted that the central gutter which was situated in the said plot being at higher level, the liquid coming out in the tabela did not flow properly in the central gutter and as a result there was stagnation of the water. It is also observed in the said report that there was no proper cleanliness maintained by the respondents. She also invited my attention to the reply filed by the respondents wherein they have stated that in fact, the respondents had closed the said activity of cattle shed. She submitted that this affidavit was patently false in view of the subsequent report

submitted by the Corporation which clearly indicated that the respondents were still carrying on the said activity. In support of the said submission, she invited my attention to the judgment of the Apex Court in the case of **Municipal Council, Ratlam V/s. Shri Vardichan and others, reported in (1980) 4 SCC 162** wherein the scope and power which is to be exercised by the Magistrate under Section 133 has been laid down. She also invited my attention to the judgments of the Apex Court in the case of **Kachrulal Bhagirath Agrawal and others V/s. State of Maharashtra and others, reported in (2005) 9 SCC 36** and **State of M.P. V/s. Kedia Leather & Liquor Ltd. and others, reported in (2003) 7 SCC 389**. There is also a judgment of this Court in the case of **Vijaykumar s/o. Jamnadas Wadera and others V/s. State of Maharashtra and others, reported in 2003(1) Maharashtra Law Journal 952.**

7. The learned Counsel for the respondents, on the other hand, submitted that the petitioner was a builder by profession and he had obtained Power of Attorney for the purpose of developing the suit property and that the

said complaint had been filed by him with an oblique motive of removing the respondents from the said plot so that he would be in a position to develop the said property. It was further submitted that there was no reason to interfere with the order passed by the Sessions Court. It was submitted that the Sessions Court had modified the order and had directed the respondents to remove the nuisance caused as a result of the said activity and accordingly, the respondents had taken steps for the removal of the nuisance. It was submitted therefore, there was no reason to interfere with the said order.

8. Shri Apte, learned Counsel for the Corporation submitted that the allegations made by the petitioner in this petition that the reservoir which was situated in the adjoining area was polluted as a result of this activity, was found to be incorrect and that clear statement to that effect had been made by the Corporation in the report submitted to this Court. He submitted that further it is stated in the report that after inquiry was made it is found that no diseases were

caused as a result of the said activity. He submitted that the petitioner could approach the Executive Magistrate for further action as contemplated under Section 138 read with Section 141 of the Cr.P.C.

9. Before considering rival submissions which are made by the learned Counsel appearing for the parties, it would be relevant to consider the relevant provisions. Section 133 of the Cr.P.C. lays down the procedure which has to be followed by the Sub-divisional Officer or Executive Magistrate for the purpose of removal of nuisance and the said provision permits the authority to pass a conditional order for removal of nuisance. A perusal of the aforesaid provision clearly indicates that the discretion is vested with the Magistrate to pass a conditional order requiring such person causing such nuisance either to remove such obstruction or nuisance or to regulate such trade or occupation in such manner as may be directed. After the said conditional order is passed, the Executive Magistrate can issue a Show Cause Notice asking the person causing nuisance as to why such order should not

be made absolute. Section 134 lays down the procedure in respect of service or notification of the order. Section 135 further lays down the person to whom the order is to be addressed. Section 136 lays down the consequences of failure on the part of such person to obey the said order and under Section 138 after the Show Cause Notice is issued, power is given to the Magistrate to make the said order absolute with or without modification. Finally, the consequences of disobedience after the conditional order is made absolute under Section 138 are laid down under Section 141. In the present case, a report had been submitted to the Executive Magistrate and thereafter, the Executive Magistrate had passed an order directing the removal of the cattle shed. This order was challenged by the respondents in revision and the said order was modified and a conditional order was passed directing the respondents to remove the nuisance instead of removing the cattle shed. It would be relevant to note the directions which were given by the Sessions Court. The operative part reads as under :-

> 1. The direction of the learned Magistrate is slightly modified to read that the Revision Petitioner shall make the proper arrangement for removal of the nuisance and its discontinuance permanently through maintenance of the cattle shed to the satisfaction of the Sub-Divisional Magistrate who shall however have a supervisory eye on the execution, within a fortnight.
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> 2. This order shall cover both the proceedings registered as Criminal Revision Nos.72/97 and 81/98 in this Court."

10. A perusal of the order passed by the Executive Magistrate and order passed by the Sessions Judge, in my view, clearly discloses that a conditional order initially was passed by the Executive Magistrate under Section 133 for the removal of the shed itself which was later on modified by the Sessions court and the respondents were asked to remove the nuisance by maintaining the cattle shed to the satisfaction of the Sub-Divisional Magistrate. Conjoint reading of both the aforesaid orders would, in my view, clearly indicate that no Show Cause Notice was issued by the Executive Magistrate nor the conditional order was made absolute in terms of Section 138 of Cr.P.C. It is not possible to accept the submission made by the learned Counsel for

the petitioner that on account of the admission given by the respondents, the Executive Magistrate was justified in passing the order of removal of cattle sheds. The second submission of the learned Counsel for the petitioner that therefore, the Sessions Court had erred in modifying the order passed by the Executive Magistrate, also cannot be accepted. The provisions of Sections 133 to 141 clearly lay down the procedure which is required to be followed by the Executive Magistrate. In the present case, if it is the case of the petitioner herein that the said directions which were issued for removal of nuisance are not followed, then in that case, it is always open for the petitioner to approach the Executive Magistrate and seek further orders of issuance of Show Cause Notice and confirmation of the order passed by him under Section 133 by passing an order under Section 138 of the Cr.P.C. The petitioner has an alternate remedy of filing a suit for removal of nuisance under Section 91 of the CPC. If even after final orders are passed under Section 138 of Cr.P.C., by virtue of provisions of Section 141, a person disobeying orders passed by the Magistrate can be convicted for an

offence punishable under Section 188 of the IPC.

11. On a conjoint reading of the said provisions, it is clear that discretion is vested in the Executive Magistrate of taking action against a person who is causing nuisance. The Magistrate has the power to issue appropriate directions, however, there cannot be any strait-jacket formula for the purpose of passing order in such cases as it would depend on the fact and circumstances of each case. The gravity of the nuisance, the nature of the prayer and the possible harm which is likely to be caused by the said nuisance would be some of the factors which Executive Magistrate would be required to consider before passing any order Section 133 and confirming the said under 138 of Cr.P.C. Obviously, the conflicting interest of the right of a person to carry on business and the interest of public at large have to be reconciled before passing any adverse order. The Executive Magistrate also has to consider the bonafides of a person to file the said complaint and thereafter to see whether if the said bonafides are challenged by other side whether the said

allegations are proved or not. In the present case, it has been alleged by the respondents and in my view, there is much substance in the allegation that the petitioner is merely a person who is interested in getting the plot vacated so as to develop the said plot. The initial complaint which was filed by the petitioner herein which is annexed at Exhibit-A clearly indicates that it has been filed on behalf of the Darshan Builders and Developers. The Sessions Court, therefore, in my view, was justified in modifying the order passed by the Executive Magistrate under Section 133 and directed the respondents to remove the said nuisance instead of removing the cattle sheds altogether. The further procedure after passing the order under Section 133 apparently has not been followed so far. The grievance made by the learned Counsel on behalf of the petitioner that in view of the report filed by the Corporation and in view of the admission given by the respondents, this Court to give appropriate directions to the respondents, also cannot be accepted since this Court cannot substitute its own view to the view which may be given by the Executive Magistrate before confirming the

conditional order which is passed under Section 138. There is no dispute regarding the ratio of the judgment on which reliance is placed by the learned Counsel for the petitioner. In the present case, however, in my view, there is no infirmity in the order passed by the Sessions Court and directions have been given by the said Court to remove the nuisance. It is always open for the petitioner to make an appropriate complaint if the said order is not followed. At this stage, it would be, therefore, premature to pass any order particularly while exercising writ jurisdiction under Article 227 of the Constitution of India. This Court cannot convert itself or exercise its jurisdiction into PIL jurisdiction which is exercised by the Division Bench of this Court.

12. For the aforesaid reasons, writ petitions are dismissed. Rule is discharged.

(V.M. KANADE, J.)